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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

A.P.,

Petitioner,

v.

THE SUPERIOR COURT OF CONTRA
COSTA COUNTY,

Respondent;

CONTRA COSTA COUNTY CHILDREN
AND FAMILY SERVICES BUREAU et al.,

Real Parties in Interest.

A145767

(Contra Costa County
Super. Ct. Nos. J1300480, J1300481)

Petitioner A.P. is the mother of the nine-year-old twins J.M and A.M., who were placed with a relative in long-term foster care. The children were later removed from that home at the relative's request and placed with a former respite caregiver who wishes to adopt them. At a postpermanency status review hearing held pursuant to Welfare and Institutions Code section 366.3, subdivisions (d) and (h),¹ the juvenile court set the matter for a hearing under section 366.26 to consider modifying the long-term foster care plan to adoption or guardianship.

Mother seeks extraordinary writ review of the court's order, arguing a section 366.26 hearing would be "premature." We deny the petition. We also deny mother's request for a stay of the section 366.26 hearing, which is currently set for November 2, 2015.

¹ Further statutory references are to the Welfare and Institutions Code.

BACKGROUND

On April 23, 2013, the Contra Costa County Children and Family Services Bureau (CFS) filed dependency petitions on behalf of J.M. and A.M. J.M. was considered medically fragile at the time, having had bone cancer and chemotherapy treatment, along with a partial amputation of one of his arms. The children were declared dependents under section 300 based on mother's submission to allegations that she had taken J.M. from the hospital against medical advice after he was diagnosed with congestive heart failure.² They were removed from mother's custody and mother was given a reunification plan that required her to obtain a psychological evaluation and medication assessment in light of the mental health issues apparent from her behavior.

On October 24, 2014, the court terminated reunification services following a six-month/twelve-month status review hearing and ordered a permanent plan of long-term foster care. (§ 366.21, subd. (g)(5).) Visitation was suspended due to mother's erratic and damaging behavior during visits. Mother appealed, and we have affirmed that order in a separate opinion. (*In re J.M. et al.* (Sept. 21, 2015, A143918) [nonpub. opn.]³)

In November 2014, J.M. and A.M. were placed with a maternal aunt who lived out of state. On January 7, 2015, the aunt contacted CFS to report that the children had been engaging in inappropriate sexual behavior including masturbating together out in the open and touching the aunt's younger grandchildren. The children confided to their aunt that mother had showed them how to touch themselves after they caught her masturbating and had told them that "this was an activity they would do all together in secret." The aunt was no longer willing to have the children in her home, and they were moved back to California and placed with a former respite caregiver who had expressed an interest in adopting them.

On June 24, 2015, mother filed a motion under section 388 (Form JV-180) asking the court to modify the prior orders by reinstating visitation and reunification services.

² J.M.'s health has much improved since then and his medical condition is good.

³ A more complete description of the case history can be found in our opinion in that appeal.

She stated in the motion that she had been participating in mental health treatment and was making good progress, and attached letters from two mental health practitioners saying she had been attending therapy and was compliant with medication. One of the letters, from Belinda Lopes, Ph.D., stated: “As a result of our work together [mother] has become emotionally and psychologically more capable to hold the responsibilities and demands of daily life functioning. We will continue to work together on her various goals.”

A postpermanency status review hearing was held July 2, 2015. (§ 366.3, subd. (d).) In anticipation of that hearing, CFS submitted a report recommending that the case be set for a hearing under section 366.26 to determine a permanent plan. It indicated that the children were thriving in the care of their foster mother, who wished to adopt them, and that they had begun family counseling sessions with her. The report also noted that CFS had initiated applications to get the children into therapy through the Victims of Crime program to address issues relating to their possible sexual assault. As affirmative evidence, mother submitted copies of the same letters from her mental health providers that she had submitted in support of her section 388 motion, which indicated she had been attending therapy and was compliant with her medication.

Mother’s counsel asked for a continuance of the status review hearing because the appeal from the hearing at which reunification services were terminated was still pending. Counsel also objected to setting the case for a hearing under section 366.26, arguing it was “premature” because the children had only recently been placed with their foster mother. County counsel and minors’ counsel argued it would be in the best interests of the children to develop a permanent plan.

After considering the report submitted by CFS and the letters provided by mother’s mental health providers, the court set the case for a section 366.26 hearing on November 2, 2015. It found CFS had provided mother with reasonable services, that returning the children to mother would be detrimental, that reinstating visitation would be detrimental, and that it was in the children’s best interests to select a permanent plan. Mother’s section 388 motion was set for a hearing on July 22, 2015.

Mother filed a timely notice of intent to file a writ petition.

DISCUSSION

A. The Juvenile Court Properly Set a Section 366.26 Hearing

In this petition, mother contends it was premature to set a hearing under section 366.26 because the children had only been placed with the foster mother (and prospective adoptive parent) for a short time. Mother notes that the children had been placed on a waiting list for therapy designed to address their sexualized behaviors, and argues it was not in their best interests to select a permanent plan other than long-term foster care when they might need the services of CFS beyond the scheduled hearing date of November 2, 2015. We disagree.

Section 366.3 provides for a status review at least every six months in the case of a child placed in long-term foster care. (§ 366.3, subd. (d).) Subdivision (h) of that section provides: “The court shall order that a hearing be held pursuant to Section 366.26, unless it determines by clear and convincing evidence that there is a compelling reason for determining that a hearing held pursuant to Section 366.26 is not in the best interest of the child because the child is being returned to the home of the parent, the child is not a proper subject for adoption, or no one is willing to accept legal guardianship.” A child may remain in long-term foster care without a section 366.26 hearing only when it is unlikely the child will be adopted or one of the exceptions enumerated in section 366.26, subdivision (c)(1) applies.⁴ (§ 366.3, subd. (h).)

⁴ Section 366.26, subdivision (c)(1) lists exceptions to the statutory preference for adoption: (1) when the child is living with a relative, foster parent, or Indian custodian who is unable or unwilling to adopt and removal of the child from that home would be detrimental to the child; (2) when the parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship; (3) when the child is placed in a residential treatment facility and adoption is unlikely or undesirable; (4) when a child over the age of 12 objects to adoption; (5) when adoption would interfere with a child’s sibling relationship; and (6) in the case of an Indian child, when adoption would interfere with tribal connections or when the tribe has identified another permanent plan or living arrangement. No evidence was presented at the status

“[S]ection 366.3 expressly contemplates that, absent a ‘compelling reason,’ a section 366.26 hearing will be scheduled at any postpermanency status review hearing conducted by the juvenile court pursuant to section 366.3 in a case in which the previously selected permanent plan was long-term foster care. The statutory scheme ensures that efforts are continuously being made to find a more permanent placement for a child in long-term foster care. The legislative preference is ‘for adoption over legal guardianship over long-term foster care.’ [Citation.] When the court conducts the review hearing, it ‘proceeds under a presumption that long-term foster care is *inappropriate*. It is obligated to act accordingly.’ [Citation.]” (*M.T. v. Superior Court* (2009) 178 Cal.App.4th 1170, 1178, citing *San Diego County Dept. of Social Services v. Superior Court* (1996) 13 Cal.4th 882, 888.)

Mother did not present clear and convincing evidence of any compelling reason for delaying a hearing under section 366.26. She makes no argument it would have been safe to return the children to her care. There was no evidence the children are unsuitable for adoption or guardianship; to the contrary, the foster mother wishes to adopt them. Nor is there merit to mother’s claim that a section 366.26 hearing is premature because the children have only lived with their current foster mother for a short time. The foster mother knows the children well, and by the time the section 366.26 hearing is held, they will have been in her home for about nine months.

Mother suggests it was not in the best interests of the children to set a section 366.26 hearing because if her parental rights are terminated and adoption is selected as the permanent plan, they will no longer be entitled to CFS services such as therapy for their sexualized behaviors. The record does not support mother’s assumption that if adoption is selected as the permanent plan (which is not a given), an adoptive parent would be unable or unwilling to follow through with necessary psychological treatment and care. Were we to accept mother’s position, courts would be precluded from holding

review hearing to show that any of these circumstances apply, though mother may present such evidence at the hearing under section 366.26.

a section 366.26 hearing whenever a dependent child is receiving beneficial services through the supervising agency. This is not the law.

In concluding it was appropriate for the juvenile court to set a hearing under section 366.26, we express no opinion as to what the outcome of that hearing or the permanent plan should be. We hold simply that the juvenile court did not err in setting the hearing.

B. No Stay of the Section 366.26 Hearing is Required Based on the Appeal in Case No. A143918 or Mother's Section 388 Petition

Mother asks us to stay the section 366.26 hearing, currently set for November 2, 2015, pending the issuance of our decision in her appeal from the order terminating reunification services and placing the children in long-term foster care. (*In re J.M. et al.*, *supra*, A143918.) She also asks us to stay the section 366.26 hearing pending the resolution of the motion for modification she filed under section 388 seeking to reinstate visitation and reunification services.

Because this court has issued its decision in case No. A143918 and affirmed the order terminating reunification services, there is no need to stay the section 366.26 hearing on that basis. And, assuming mother's section 388 motion is still pending, we assume it will be heard concurrently with the section 366.26 hearing if it has not already been ruled on before that hearing commences.⁵ Mother has not provided this court with a sufficient reason to issue a stay of the section 366.26 hearing at this juncture. Should mother elect to seek further appellate review of this decision or our decision in case No. A143918, she may renew her request for a stay in the juvenile court.

DISPOSITION

Mother's petition for an extraordinary writ is denied on the merits. Her request to stay the section 366.26 hearing, which is currently set for November 2, 2015, is denied.

⁵ The record provided does not reflect the status of the section 388 motion, though it was initially set to be heard on July 22, 2015. Mother represents in her petition that the motion has not yet been ruled on.

NEEDHAM, J.

We concur.

JONES, P. J.

BRUINIERS, J.

(A145767)